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Supreme Court of the United States

October Term, 1974

No. 74-442

SYNTHA ESSEX, Administratrix of the Estate of Harry E. Judd,

Petitioner,

vs.

RICHARD P. VINAL, ARNOLD S. DREYER, JOHNNIE M. WALTERS, AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Supreme Court of the United States

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No......

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SYNTHA ESSEX, Administratrix of the Estate of Harry E. Judd,

Petitioner,

vs.

RICHARD P. VINAL, ARNOLD S. DREYER, JOHNNIE M. WALTERS, AND THE UNITED STATES OF AMERICA,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Syntha Essex, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on June 6, 1974.

—o—

OPINIONS BELOW

The opinion of the District Court for the District of Nebraska is reported at 362 F. Supp. 372. The opinion of the Court of Appeals is reported at 499 F. 2d 226.

THE RECORD

A certified copy of the record below has been filed in this Court.

———o———

JURISDICTION

The judgement of the Court of Appeals for the Eighth Circuit was entered on June 6, 1974. A timely petition for rehearing together with a suggestion for rehearing en banc were denied on July 17, 1974. This petition for a writ of certiorari was filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

———o———

QUESTIONS PRESENTED

1. In a case where taxpayer made deposits in anticipation of tax assessment and where no assessment was ever made prior to taxpayer's suit or prior to the expiration of the statutory period for assessment, is a suit to recover the deposits barred by petitioner's failure to submit a tax refund claim?

2. Where subject matter jurisdiction is given federal district courts by 28 U.S.C. § 1340 with respect to civil actions "arising under any Act of Congress providing for internal revenue," may an action be maintained in the district court against the United States pursuant to its consent

to suit and waiver of sovereign immunity contained in the Tucker Act, 28 U. S. C. § 1346 (a) (2), and if so, is the $10,000 limitation in the Tucker Act a limitation on jurisdiction or a limitation on the consent?

3. With respect to the above question, and if the $10,000 limitation is jurisdictional, is the original jurisdiction given district courts over cases arising under internal revenue laws unlimited as to amount without respect to whether individual or class actions are involved?

4. Where it is alleged that officers of the United States acted *ultra vires* and beyond their statutory authority, may they be sued individually and compelled by an action in the nature of mandamus to return the monies deposited and if so, should the allegations against them be taken as true for the purposes of a motion to dismiss?

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 1340:

> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court. June 25, 1948, c. 646, 62 Stat. 932.

28 U.S.C. § 1346 (a):

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected,

or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

28 U. S. C. § 1361 *Action to compel an officer of the United States to perform his duty:*

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6203. METHOD OF ASSESSMENT.

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary or his delegate in accordance with rules or regulations prescribed by the Secretary or his delegate. Upon request of the taxpayer, the Secretary or his delegate shall furnish the taxpayer a copy of the record of the assessment.

Treasury Regulations on Procedure and Administration (1954 Code) (26 C.F.R.):

§ 301.6203-1 *Method of assessment.*

The district director and the director of the regional service center shall appoint one or more assess-

ment officers. The district director shall also appoint assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

28 U.S.C. § 1491:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and

such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority.

———o———

STATEMENT

The petitioner, asserting jurisdiction in the District Court under 28 U.S.C. §§ 1340, 1346 and 1361, filed three complaints containing substantially similar allegations on her behalf and on behalf of others similarly situated.

In each of the three cases, petitioner alleged that she (and those similarly situated with her) made deposits of money with officers of the United States charged with the collection of taxes in anticipation of the assessment of taxes and in satisfaction of the liability for taxes to be assessed. Asserting that liability for payment of a tax does not come into being until a tax is actually assessed within the limitations period; that in these cases, there was no assessment at all, and that, therefore, ownership of the funds deposited remains in the depositors, the petitioner brought these class actions seeking discovery of the complete record of the assessments, an accounting of the monies deposited, a mandatory injunction requiring the

officers who received the deposited money to return the same, a money judgment for the amount of the deposits, and other general relief.

In each case, Motions to Dismiss were filed on behalf of the United States and the individual respondents grounded upon a lack of subject matter jurisdiction in the District Court. The Court of Appeals affirmed the decision of the District Court granting the Motions to Dismiss. The court below determined that the suits were suits against the United States only and that, as such, they were barred for failure of the petitioner to establish that the United States had waived its immunity from suit in such a case, particularly where petitioner had failed to file a claim for refund of taxes.

The gravamen of petitioner's allegations in each case was to the effect that an assessed liability for a tax can arise only at the time when an assessment officer signs the certificate of assessment on a summary record of assessment, and that in each case, the persons purporting to act for the individual defendants were, in fact, not assessment officers with power and authority to act as such under the laws of the United States, and, thus, there was never any assessment of tax liability against the petitioner and those similarly situated with her.

—o—

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Brafman v. United States*, 384 F. 2d 863 (CA5, 1967).

The court below held that a purported assessment of estate tax liability pursuant to 26 U.S.C. § 6201 was *de facto* valid notwithstanding allegations by the petitioner in her complaint that the purported assessments in question were made by persons not authorized to act as assessment officers under the federal revenue laws and regulations, and that the acts of the officers were therefore *ultra vires* and the assessments null and void.

In *Brafman*, the Court ruled that a purported tax assessment was void for want of the signature and approval of "a *responsible* officer of the Internal Revenue Service," the court there characterizing a responsible officer as one duly appointed by the District Director in accordance with the applicable statutory and regulatory provisions. (Emphasis supplied.) The strict scrutiny afforded the validity of tax assessments by the Fifth Circuit conflicts directly with the holding of the court below that mere colorable authority in a purported assessment officer will establish the validity and enforceability of an assessment against a taxpayer, notwithstanding that the taxpayer has alleged and stands ready to show that the officer is without properly delegated authority in accordance with the applicable revenue laws and regulations.

The ruling of the court below also necessarily presents a conflict with the decision of this Court in *United States v. Giordano*, — U.S. —, 94 S. Ct. 1820, 1823 (May 13, 1974). This Court there clearly held and established that a federal officer's acts or determinations are not valid or enforceable where authority is not properly vested in him in the "statutorily designated" manner. In upholding the assessment of taxes here at issue as *de facto* valid, the

court below significantly conflicts with the strict standard established by this Court in *Giordano,* by holding that a purported assessment may be enforceable by federal officers despite the fact that the purported vesting of the authority to assess taxes in those officers was accomplished in derogation of the manner prescribed by the controlling revenue law and regulations. Clearly, these conflicts raise the matter of the proper enforcement of "*de facto* valid" as opposed to legal assessments as an important federal question which should be resolved by this Court. Review is therefore warranted.

2. The court below held that the Tucker Act, 28 *U.S.C.* 1346 (a) (2), was not applicable to the actions brought by the appellant for the recovery of funds deposited in advance of the assessment of tax liabilities, which assessments were never validly made, the court ruling that 28 *U.S.C.* § 1346 (a) (1) was the sole provision "upon which plaintiff may establish a waiver of immunity on behalf of the United States." This Court has held that jurisdiction over suits against the United States extends to actions founded upon the federal revenue laws under the Tucker Act, 28 *U.S.C.* § 1346 (a) (2). *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28 (1915). That section provides, in pertinent part, that suits may be maintained against the United States "not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department . . ." This conflict of decisions is also reflected in the decision of the Court of Appeals for the Third Circuit in *Menkarell v. Bureau of Narcotics*, 463 F.2d 88, 90 (CA3, 1970), wherein the court stated that "before 1940, under the predecessor of 28 U.S.C. § 1346 (a) (2) the United

States has consented to suits for claims for recovery of taxes, fees, and penalties alleged to have been wrongfully . . . exacted under color of federal statutes." The appellant's claim here presented is "a claim founded on a law of Congress" within the meaning of that statute, but the court below refused so to hold in declaring that the separate and distinct provision, 28 *U.S.C.* § 1346 (a) (1) was alone applicable. The court's ruling in this matter thus presents a decision in conflict with the decision of another court of appeals on the same matter, and in conflict with pertinent decisions of this Court.

Additionally the cases now here present petitioner's contention that while the concurrent jurisdiction (with the Court of Claims) given to district courts by the Tucker Act to entertain civil actions "founded . . . upon . . . any Act of Congress . . ." carries a $10,000 limitation of jurisdictional amount; nevertheless original jurisdiction unfettered by the $10,000 limit has been granted district courts with respect to certain Acts of Congress namely, "Acts of Congress providing internal revenue" 28USC § 1340. As to claims founded upon all Acts of Congress, sovereign immunity has been waived indiscriminately; jurisdiction has been parceled out. Section 1340 contains one limitation excepting from a district court's jurisdiction only "matters within the jurisdiction of the Customs Court." Matters within the jurisdiction of the Court of Claims are not excepted.

Two of petitioner's three complaints in the district court involved claims on behalf of petitioner exceeding $10,000; one did not. As class actions all three claims involved in excess of $10,000.00.

There are thus presented here important questions of federal court jurisdiction and jurisdictional amount in ordinary and in class actions which have not been, but which should be, settled by this Court. As to class actions the further question raised is whether the prerequisites for federal question jurisdiction shall be tested on an individual or class basis where the proceeding is brought as a class action. In *Zahn v. International Paper Co.*, 414 U. S. 291, (1973) the Court held with respect to diversity actions brought under 28 *U.S.C.* § 1332 and Federal Rule of Civil Procedure 23, that "each plaintiff in a Rule 23 (b) (3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case." While the holding was formally limited to diversity actions, the Court, by footnote 11, extended its reasoning to encompass federal question jurisdiction under 28 *U.S.C.* § 1331:

> Because a class action invoking general federal question jurisdiction under 28 U.S.C. § 1331 would be subject to the same jurisdictional amount rules with respect to plaintiffs having separate and distinct claims, the result here would be the same even if a cause of action under federal law could be stated, see Illinois v. City of Milwaukee, 406 U.S. 91, 98-101, 92 S.Ct. 1385, 1390-1391, 31 L. Ed. 2d 712 (1972), or if substantive federal law were held to control this case. Of course, Congress has exempted major areas of federal question jurisdiction from any jurisdictional amount requirements, see 28 U.S.C. §§ 1333-1334, 1336-1340, 1343-1345, 1347-1358, 1361-1362, the exemption being so widely applicable, in fact, that the Court in Snyder v. Harris, 394 U.S. at 341, 89 S. Ct., at 1059, discounted the impact of its holding in federal cases.

Respecting the matter of jurisdictional amount in class suits brought under 28 *U.S.C.* § 1346 (a) (2), *see Northern Natural Gas Co. v. Grounds,* 292 F. Supp. 619, 644 (D. Kan. 1968), *aff'd in part* and *rev'd in part on other grounds* 441 F. 2d 704 (CA 10, 1971), *cert. denied* 404 U.S. 951 (1971). The court ruled first that "jurisdiction does not fail under 28 *U.S.C.* 1346(a)(2) . . . because plaintiffs have sued as a class." However, the court held further that the "jurisdictional monetary limit" there specified" applies to the claim of each member of the class and we therefore have jurisdiction over the claims not exceeding $10,000 asserted under the Tucker Act."

3. The court below affirmed the district court order dismissing the present actions as barred by the sovereign immunity of the United States, despite the fact that the order was granted without the opportunity of the petitioner to submit evidence in support of her allegations that the actions of the named individual defendants and their agents were *ultra vires* and without the authority of the federal revenue law and regulations. This presents a direct conflict with the holding of this Court in *Scheuer v. Rhodes,* — U.S. —, 40 L. Ed. 2d 90, 96 (April 17, 1974) that

> in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Moreover, the claimant should be "entitled to offer evidence to support the claims," which opportunity was not

afforded the petitioner in this action. This denial of that opportunity by the district court, as affirmed by the court of appeals below, and the failure of either court to construe the allegations of the complaint favorably to her, presents a direct conflict with the decisions of this Court. In *Scheuer,* this Court ruled that the plaintiffs were entitled to present evidence in support of their allegations that the named defendants were acting outside the scope of their official authority and that the suit brought was not one against the sovereign.

The courts of appeals have also held, with this Court, that the threshold determination of whether an action is one maintained in substance and effect against the sovereign United States is to be made from an examination of the allegations of the complaint alone. Where the plaintiff has alleged that an officer is "not exercising the powers delegated to him by the sovereign," the suit is not barred by sovereign immunity. *Dugan v. Rank,* 372 U.S. 609, 620 (1963); *Beck v. Laird,* 429 F. 2d 302, (CA 2, 1970). The decision of the court below is thus in conflict with the decisions of this Court and with other courts of appeals on the issue of what constitutes a suit against the United States and how the plaintiff may establish that the suit is brought against defendant officers in their individual, non-official capacities and not against the sovereign. Review of this conflict is therefore warranted.

CONCLUSION

For all of the foregoing reasons review is of considerable importance.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIVIL 72-0-475 72-0-476 72-0-477

SYNTHA ESSEX, administratrix de bonis non cum testamento annexo of the Estate of Harry E. Judd, deceased,

Plaintiff,

vs.

RICHARD P. VINAL, ARNOLD S. DREYER, JOHNNIE M. WALTERS, and the UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM

ROBINSON, Senior Judge.

THIS MATTER comes before the Court upon the defendants' motions to dismiss. (Filing No. 6). The plaintiff has filed three separate actions and motions to dismiss are pending in each action. The parties and issues of law are identical, and this Memorandum will be despositive (*sic*) of each motion in the other actions (Essex v. Vinal, et al., Civil 72-0-476 (Filing No. 6) and Essex v. Vinal, et al., Civil 70-0-477 (Filing No. 6)).

In each action the plaintiff, as administratrix of the Estate of Harry E. Judd, deceased, has brought a purported class action for a declaration that certain tax as-

sessments are null and void and for an accounting and payment of taxes assessed against the estate and others similarly situated.

It is alleged the plaintiff has deposited the assessed sum with the defendants and the plaintiff alleges that she "believes that others similarly situated" have made similar deposits. There is no allegation in any of the complaints that the plaintiff or anyone else has filed any claim for a refund or credit with the Secretary prior to bringing the actions.

The defendant asserts in its motion to dismiss that this Court does not have jurisdiction over the respective actions.

The defendants have filed a comprehensive brief. The plaintiff has requested oral arguments but the Court has concluded that oral arguments are not necessary and that the matter should be taken under submission upon the basis of the present record. See Rule 16(c) and Rule 16(e) (as amended) of the Rules of Practice, United States District Court, District of Nebraska.

The plaintiff alleges jurisdiction pursuant to 28 U. S. C. §§ 1340, 1346, and 1361. The plaintiff has named several individuals as defendants as well as the United States. It is further alleged by the plaintiff that each individual defendant is an officer and employee of the United States and that each individual defendant had authority under the internal revenue laws of the United States to assess federal taxes. It is further alleged by the plaintiff that each individual was acting on behalf of the United States and purported to act under an Act of Congress providing

for internal revenue. Thus it can be established from the pleadings that the individual defendants were acting within their scope of official authority and would be immune from any personal liability. *See Bershad v. Wood,* 290 F. 2d 714 (9th Cir. 1961). This is then, a suit against the sovereign and this Court does not have jurisdiction over the subject matter absent a waiver of sovereign immunity. *See Minnesota v. United States,* 305 U. S. 382 (1939); *United States v. Sherwood,* 312 U. S. 584 (1941).

Neither 28 U. S. C. § 1340 nor 28 U. S. C. § 1346 constitute a waiver of sovereign immunity.

As stated in *Quinn v. Hook,* 231 F. Supp. 718, 719 (E. D. Penn. 1964):

> "The grant by § 1340 of jurisdiction in the district courts to entertain civil actions under the internal revenue laws is not of itself a waiver of governmental immunity from suit. It merely authorizes proceedings in which the Government has by some other statutory provision consented to be sued. (Footnote citation omitted.)"

and it was held in *United States v. Rochelle,* 363 F. 2d 225 (5th Cir. 1966) that the requirement of 28 U. S. C. § 7422 (a) that a claim for a refund must be filed is a jurisdictional requirement that cannot be waived, and that 28 U. S. C. § 1346 standing alone is not an unconditional waiver of sovereign immunity.

28 U. S. C. § 1361 is limited to an action for mandamus, and does not provide any waiver of immunity with respect to a refund of taxes. The defendants assert that the issues raised with respect to mandamus have been determined in an action filed by the plaintiff in *Essex v. Walters,* Civil 71-0-379. This Court takes judicial notice of its

own prior judgment in *Essex v. Walters* and concludes that dismissal is proper with respect to the relief requested in the nature of mandamus. *See Hicks v. Holland,* 235 F. 2d 183 (6th Cir. 1956) and 1 B,J.Moore, Federal Practice ¶ 0.408(1) at 951-955 (2nd Ed. 1965).

The Court does not construe the Complaint as seeking to restrain the assessment or collection of any federal tax, rather it appears simply to be an action for a refund. If the plaintiff does seek such relief then the complaint would also necessarily be dismissed because 26 U. S. C. § 7421(a) expressly prohibits the maintenance of such suits, and it is ascertainable from the pleadings that none of the exceptions would be applicable in this case. The holding of *Enochs v. Williams Packing Co.,* 370 U. S. 1, 7 (1962) would require that the complaint be dismissed. It is certainly far from "clear that under no circumstances could the Government ultimately prevail"; there is no allegation of an irreparable injury, and 26 U. S. C. § 7422 provides for a legal remedy by a suit for a refund.

There has been no allegation or suggestion that any officer, agent or employee of the United States prevented or hindered the plaintiff in filing for a refund pursuant to 26 U. S. C. § 7422.

It also follows that the action cannot be maintained as a class action. *See Heisler v. United States,* 463 F. 2d 375 (9th Cir. 1972).

The Court has concluded that the separate actions should be dismissed and a motion for a protective order in Civil 72-0-476 (Filing No. 7) is rendered moot. Separate orders will be entered.

Dated this 9th day of July, 1973.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 73-1709, 73-1710, & 73-1711

SYNTHA ESSEX, Administratrix, dbn, cta of the Estate of Harry E. Judd, Deceased,

Appellant,

vs.

RICHARD P. VINAL, ARNOLD S. DREYER, JOHNNIE M. WALTERS, and THE UNITED STATES OF AMERICA,

Appellees.

Appeals from the United States District Court for the District of Nebraska

Submitted: March 15, 1974

Filed: June 6, 1974

Before GIBSON, BRIGHT, and STEPHENSON, Circuit Judges.

GIBSON, Circuit Judge.

These consolidated cases present a somewhat novel question for our review. The plaintiff, administratrix of the estate of Harry E. Judd, who died September 8, 1965, claims that estate taxes paid by the estate were not "taxes"

but rather "deposits" as these taxes had not allegedly been assessed. These cases come before us from the District Court's[1] grant of the United States' Motion to Dismiss for lack of subject matter jurisdiction.

In order to understand plaintiff's contentions, the background details of this litigation must be set forth. The decedent, Harry E. Judd, died September 8, 1965. Int. Rev. Code of 1954, § 6705 and Treas. Reg. § 20.6075-1 (1958) in effect at the time of decedent's death required an estate tax return to be filed within 15 months after the date of death. On December 8, 1966 (the last day of the 15-month period), the estate made a $55,000 payment and requested an extension of time to file the estate tax return. This payment was assessed December 16, 1966. On January 9, 1967, the estate tax return was filed with a payment of the remaining tax shown as due on the return, $5,132.21, together with interest of $26.52. The above amount was assessed January 13, 1967. As a result of audit, a deficiency of $13,372.40 was determined by IRS. Statutory notice of deficiency was mailed March 10, 1969. After expiration of the 90-day period for seeking Tax Court review, the deficiency was assessed August 1, 1969. This amount, together with interest of $2,192.34 was paid September 15, 1969.

A claim for refund of the above amounts was made to the Commissioner September 14, 1970. On December 13, 1970, this claim was disallowed. As to the $55,000 and the

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1 The Honorable Richard E. Robinson, Senior District Judge, District of Nebraska. Judge Robinson's memorandum opinion appears at 362 F. Supp. 372 (D. Neb. 1973).

2 The District Court's legal conclusion was that this was a suit directed against the United States as sovereign without its consent, and that the Court lacked subject matter jurisdiction.

$5,158.73 payments, the reason for denial was that the statute of limitations in Int. Rev. Code of 1954, § 6511[3] had expired. The refund claim for the $13,372.40 deficiency was also denied by the Commissioner and a suit for refund of this payment, for which a timely refund claim had been made, is presently pending in federal district court. The plaintiff also, prior to the instant action, filed a suit in the district court for a writ of mandamus to compel the Internal Revenue Service to release its assessment records. Upon voluntary compliance this suit was dismissed by the District Court. The dismissal was affirmed on appeal under Local Rule 14. *Essex v. Walters*, 475 F. 2d 1407 (8th Cir.), *cert. denied*, 412 U. S. 919 (1973).

Plaintiff then brought the instant suits, styled as class actions, requesting recovery of some $28 million in toto. Her claim in each suit is identical. She alleges that each of the three payments was a deposit to be used to satisfy any tax liability assessed, but since no tax liability was assessed, these monies are being illegally retained by the

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3 Int. Rev. Code of 1954, § 6511 provides in pertinent part:

> (a) **Period of limitation on filing claim.**—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was required to be filed (determined without regard to any extension of time) or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.
>
> (b) **Limitation on allowance of credits and refunds.—**
> (1) Filing of Claim Within Prescribed Period.—No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

Service. The District Court concluded that these suits were actually suits against the United States, that there had been no waiver of sovereign immunity, and thus it was without jurisdiction.

The decision in this case requires determination of three questions: (1) whether the suit is actually a suit against the United States; (2) whether the monies were actually a deposit or were paid as taxes; and (3) if the monies were paid as taxes, and the suit is actually against the United States, whether sovereign immunity has been waived.

Plaintiff argues that this is not a suit against the sovereign because the actions of the defendants[4] were *ultra vires* their statutory authority and thus fall into the first exception regarding the permissibility of maintaining suits against government officials restated in *Dugan v. Rank*, 372 U. S. 609, 621-22 (1963):

> Those exceptions are (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void.

We do not need to decide whether or not these acts were *ultra vires* for "the existence of a right to sue the officer is not the issue in this case * * * (but) (t)he issue here is whether this particular suit is not also, in effect, a suit against the sovereign." *Larson v. Domestic & Foreign*

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4 Defendant Richard P. Vinal is District Director of Internal Revenue Nebraska District. Arnold S. Dreyer is Director of the Midwest Regional Service Center. Johnnie M. Walters is the former Commissioner of Internal Revenue.

Commerce Corp., 337 U. S. 682, 687 (1949). We hold that it is. This is not a suit to recover damages for an agent's personal actions, rather it requests the return of monies deposited in the United States Treasury. The relief sought is, in fact, relief against the United States for alleged wrongs committed by its subordinate officials and as such is barred, absent an effective waiver.

> Since the sovereign may not be sued, it must also appear that the action to be restrained or directed is not action of the sovereign. The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement.

Larson v. Domestic & Foreign Commerce Corp., supra at 693.

Thus, before determining whether there has been any waiver of immunity in these cases, the character of the monies paid must be determined. Plaintiff asserts that the decisions in *Rosenman v. United States*, 323 U. S. 658 (1945), and *Brafman v. United States*, 384 F. 2d 863 (5th Cir. 1967), require a conclusion that these monies are deposits rather than payments of taxes.

It is clear that the monies paid were not intended as deposits but as taxes. The initial $55,000 payment was made on the due date for filing the estate tax return at the same time that an extension of time for filing was requested. The payment of $5,132.21 plus interest of $26.52 made January 9, 1967, was made as a payment of the remainder of tax due as shown on the return filed the same date. And the last payment of $13,372.40 plus interest of $2,192.34 in response to a statutory notice of deficiency was obviously intended as a payment of tax.

The Service treated these payments as taxes and not as deposits. The advance payment of $55,000 December 8, 1966, was assessed December 16, 1966, pursuant to the authority contained in Int. Rev. Code of 1954, § 6213(b)(3); Treas. Reg. § 301.6213-1(b)(3) (1954); and Rev. Proc. 64-13[5] allowing advance payments to be assessed upon receipt. The later payments also were assessed as taxes instead of being held as deposits by the Service.

The plaintiff's legal argument boils down to the contention that these assessments made were void because Treas. Reg. § 301.6203-1 (1961) was not complied with. Int. Rev. Code of 1954, § 6203 specifies that an assessment

> shall be made by recording the liability of the taxpayer in the office of the Secretary or his delegate in accordance with rules or regulations prescribed by the Secretary or his delegate.

Treas. Reg. § 301.6203-1 provides in pertinent part:

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5 In view of the difficulties presented by advance payments when the amount of tax due could not be determined by the Service at the time of payment, the Commissioner issued Rev. Proc. 63-11, 1963-1 Cum. Bull. 497 setting forth how advance payments would be handled. This was superseded by Rev. Proc. 64-13, 1964-1 Cum. Bull. 674 in effect at the time these payments were made. Rev. Proc. 64-13, §§ 3.02 and 3.03 provide in pertinent part:

> .02 An advance payment made before the mailing of a statutory notice of deficiency (90-day letter), which is made by a taxpayer as a payment in respect of a pending deficiency, will also be assessed upon receipt or as soon thereafter as is practicable, provided the District Director of Internal Revenue is in a position to ascertain the amount of the deficiency * * *.
>
> .03 An advance payment received before the mailing of a statutory notice of deficiency which is not assessed will be treated as a deposit in the nature of a cash bond for the payment of taxes thereafter found to be due.

> *Method of Assessment.*—The district director and the director of the regional service center shall appoint one or more assessment officers. The district director shall also appoint assessment officers in a Service Center servicing his district. *The assessment shall be made by an assessment officer signing the summary record of assessment.* (Emphasis supplied.)

The asserted noncompliance with the regulation is the allegation that those officers who signed the assessment certificates were not in fact "assessment officers." Accepting *arguendo* that this is so, we find nothing in *Rosenman or Brafman* to support the plaintiff's legal contention that the assessments are thus void and the payments converted to deposits subject to recovery in the instant suit.

In *Rosenman,* the Commissioner's claim was that the date of a $120,000 advance payment should govern the running of the statute of limitations for filing a claim for refund. This contention was rejected because the payment had been held in a special suspense account and was not considered as "payment" until the amount of tax due was actually assessed by Internal Revenue. There is no doubt that had the deposit been assessed upon receipt as was done in the present case, it would have been considered "payment" at that time.

Brafman is closer to plaintiff's position. In *Brafman,* the Commissioner in 1962 attempted to impose transferee liability for estate taxes upon a beneficiary of the estate of a decedent who died in 1951. This liability was predicated upon an assessment certificate prepared August 1, 1956, after a Tax Court decision in favor of the Government. The *Brafman* court began with the proposition that there could be no transferee liability if there was no as-

sessment within the statutory period, which in *Brafman* terminated September 28, 1957. The assessment certificate of August 1, 1956, was unsigned. Treas. Reg. § 301.6203-1, *supra*, was interpreted to require signature on the assessment certificate. An unsigned certificate was determined to be wholly void, thus there was no assessment upon which to base transferee liability.

So far as our research has disclosed, plaintiff presents an argument of first impression. Arguably, it would be permissible to interpret Treas. Reg. § 301.6203-1 to void a signed assessment if not signed by an authorized assessment officer. However, we think such an approach is totally unwarranted. The distinction, as we see it, between *Brafman* and the present case is that *Brafman* involved the facial invalidity of the assessment; any person familiar with the requirement that an assessment certificate be signed would at once recognize the invalidity of an unsigned assessment. In the present case the assessments are at least *de facto* valid; no irregularity appears on the face of the assessment certificates. Even accepting plaintiff's allegations as true, we think this would establish only that the assessment was erroneously or illegally made, not that no assessment was made. Provision for challenging an erroneous or illegal assessment is provided by 28 U. S. C. § 1346(a)(1). This section reads:

United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or col-

> lected, or * * * any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws * * *.

The above provision is the only one upon which plaintiff may establish a waiver of immunity on behalf of the United States, yet this avails her little due to her failure to make a timely administrative claim. Int. Rev. Code of 1954, § 7422(a) provides:

> (a) *No suit prior to filing claim for refund.*— No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or * * * of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

Plaintiff's administrative claim for refund of the first two payments was not timely filed in accordance with Int. Rev. Code of 1954, § 6511, *supra*. The filing of a timely claim for refund under § 7422(a) is a prerequisite to a tax refund suit and is a jurisdictional requirement that cannot be waived. *Canton v. United States*, 388 F. 2d 985, 986 (9th Cir. 1968); *United States v. Rochelle*, 363 F. 2d 225, 231 (5th Cir. 1966). Thus whatever claim plaintiff has regarding the first two payments is barred by the limitation period. The final payment is the subject of a presently pending refund suit in the district court.[6] The District

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6 Our foregoing discussion assumes, only for the purpose of deciding plaintiff's waiver of sovereign immunity argument, that an action on the allegedly illegal assessments might lie under § 1346(a)(1). We

(Continued on following page)

Court correctly concluded it was without jurisdiction to hear the instant cases.

Plaintiff incorrectly argues that 28 U. S. C. § 1340[7] and § 1361[8] constitute waivers of sovereign immunity. It is well settled that such is not the case. Regarding 28 U. S. C. § 1340, see *Falik v. United States*, 343 F. 2d 38, 40 (2d Cir. 1965); *Yannicelli v. Nash*, 354 F. Supp. 143, 149 (D. N. J. 1973); *Quinn v. Hook*, 231 F. Supp. 718, 719 (E. D. Pa. 1964), *aff'd* 341 F. 2d 920 (3d Cir. 1965). That § 1361 does not constitute a waiver, see *White v. Administrator of G. S. A.*, 343 F. 2d 444, 447 (9th Cir. 1965); *Massachusetts v. Connor*, 248 F. Supp. 656, 660 (D. Mass. 1966), *aff'd* 366 F. 2d 778 (1st Cir. 1966); *Switzerland Co. v. Udall*, 225 F. Supp. 812, 819-20 (W. D. N. C.), *aff'd* 337 F. 2d 56 (4th Cir. 1964), *cert. denied*, 380 U. S. 914 (1965).

The judgment of the District Court dismissing these actions is affirmed.

(Continued from previous page)

neither hold nor imply that the allegations of the complaint state any cause of action against the United States, even if timely brought.

7 28 U. S. C. § 1340 provides:

Internal Revenue; customs duties

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

8 28 U. S. C. § 1361 provides:

Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel any officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-442

SYNTHA ESSEX, PETITIONER

v.

RICHARD P. VINAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

We invite the Court's attention in the following facts, which indicate that the petition for a writ of certiorari was filed out of time. The judgment of the court of appeals was entered on June 6, 1974 (Pet. App. 5a). A petition for rehearing was denied on July 17, 1974 (Pet. 2). The 90-day period provided by 28 U.S.C. 2101(c) for petitioning in civil cases expired on October 15, 1974, and no extension of time was obtained. The petition was not filed until October 17, 1974.

Since the time limit specified by 28 U.S.C. 2101(c) is jurisdictional, the petition should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.